

September 1, 2006

City of Cincinnati



Date: July 20, 2006

To: Michael L. Cervay, Director, Community Development & Planning

From: J. Rita McNeil, City Solicitor *JLM by RG*

Copy to: Margaret Wuerstle, Chief Planner

Subject: IDC Overlay Districts

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Based upon the Community Development and Planning Department's request to amend Zoning Code Chapter 1431, Interim Development Control Overlay Districts, the Law Department reviewed the proposed changes to determine if they might leave the City vulnerable to inverse condemnation "takings" claims. The proposed changes include: 1) removal of the requirement for an approved plan in order to establish an IDC; and 2) the addition of allowing "other documentation approved by the City Planning Commission" to serve as a basis for the establishment of an IDC. In addition to the review of the proposed changes, the Law Department has drafted an additional section for inclusion in the IDC Chapter that would allow imposition of an IDC after City Planning Commission approval of a zone change ("Zone Change IDC"). As discussed below, the two (2) proposed changes could potentially open the City to inverse condemnation claims, where the Law Department's proposal does not appear to do so.

ANALYSIS

An inverse condemnation occurs when a government agency takes property or interferes in the use of a right inherent in property without the formal exercise of its power of eminent domain (or "taking"). The under-pinning of eminent domain law was succinctly described by the United States Supreme Court in *Penn Central Transp. Co. v. New York City* (1978), 438 U.S. 104, 123-124, [quoting *Armstrong v. United States* (1960), 364 U.S. 40, 49]:

The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The Supreme Court, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002), 535 U.S. 302, adopted the *Penn Central* test in cases where a government regulation has not effected a physical taking of property, but has temporarily denied the owner the value of economic use of that property. The *Tahoe* case revolved around two (2) thirty-two (32) month moratoria on development while the Tahoe Regional Planning Agency ("TRPA") studied the

impact of development on Lake Tahoe. The purpose of the moratoria was to allow the TRPA to design strategies that would allow growth that was environmentally sound. The moratoria were based upon earlier findings and recommendations of the TRPA and goals set out in the TRPA Compact, entered into between the states of California and Nevada. The Court stated that the moratoria would be a taking if they either: 1) did not substantially advance legitimate state interests, or 2) denied the affected owners the economically viable use of their lands. Ultimately, the Court upheld the moratoria. The Court found that the prohibition on development was of a temporary nature and, because it did not single out individual owners, each owner was both burdened and benefited by the moratoria. Additionally, the Court found that development of a comprehensive plan based upon the goals of the Compact was a legitimate state interest.

The current provisions of Zoning Code Chapter 1431 allow the imposition of an IDC district in a manner that is similar to the *Tahoe* moratoria, in that IDCs are based on overriding community plans previously approved by the Planning Commission. Those plans are similar to the goals and findings that formed the basis for the *Tahoe* moratoria and, therefore, substantially advance legitimate City planning interests. Under *Tahoe*, establishing an IDC without basing it upon prior approved plans, or some other documentation that rises to the level of an approved planning document, would not substantially advance legitimate City planning interests. Instead, it could be held to be an arbitrary action for the benefit of a group of private property owners to the burden of another. An owner so affected could be able to prove that the IDC had worked an inverse condemnation on the property in question.

The proposed Zone Change IDC, however, would be imposed upon the basis of a zoning study and would require that the Planning Commission have approved the proposed zone change. The zoning study is a plan for part of a community and, once approved by the Planning Commission through approval of a zone change, is similar to the goals and finding used to establish the *Tahoe* moratoria. Therefore, an IDC based upon an approved zone change, like the *Tahoe* moratoria, substantially advances legitimate City planning interests. Therefore, it appears unlikely that an affected owner could prove a taking of the owner's property.

CONCLUSION

Establishing an IDC that is not based upon an approved plan or that is based upon "other documentation approved by the City Planning Commission" does not appear to substantially advance legitimate City planning interests as required by *Tahoe*. An IDC that benefits one constituent or one community group opposed to a particular construction or demolition project in their neighborhood potentially leaves the City vulnerable to the allegation that it is not acting in the public's best interest. A taking claim against the City could be the likely result. However, the Zone Change IDC does appear to meet the *Tahoe* requirements and, therefore, could likely withstand a takings challenge.

If you have any further questions regarding this matter, please do not hesitate to call Assistant City Solicitor Dotty Carman at extension 1575.